



**Federal
Home Loan
Bank**
OF INDIANAPOLIS

Via Email and Federal Express

January 16, 2004

Federal Housing Finance Board
1777 F Street, N.W.
Washington, D.C. 20006

ATTN: Public Comments

Re: September 17, 2003, Proposed Rule – Registration by Each Federal Home Loan Bank of a Class of its Securities Under the Securities Exchange Act of 1934

The Federal Home Loan Bank of Indianapolis ("Bank") appreciates the opportunity to provide its comments on the Federal Housing Finance Board's ("Finance Board's") proposed rule ("Proposal") regarding the registration by each Federal Home Loan Bank ("FHLBank") of a class of its securities under the Securities Exchange Act of 1934 ("Exchange Act"). The Bank's Board of Directors met today, January 16, 2004, and voted unanimously to provide the following comment on this important subject.

I. The Bank Supports the Adoption of a Finance Board-Administered Securities Disclosure Regime for the FHLBanks Similar to the Finance Board's Current Regulation for the FHLBank System

The Bank supports the Finance Board's objective of having each of the FHLBanks provide comprehensive, fully transparent securities disclosure. In support of this objective, the Bank, along with the other FHLBanks, has made recommendations to the Finance Board for an enhanced Finance Board-administered securities disclosure regime that would ensure first class disclosure standards for the FHLBanks.

The Bank believes that the Finance Board is in the best position to assure the timeliness, accuracy and completeness of FHLBank disclosures. This is because the Finance Board was established by Congress to exercise the full range of regulatory and examination authority over the activities and operations of the FHLBanks that provide it with intimate knowledge of each of the FHLBank's business and financial condition. It has unparalleled ability to scrutinize and oversee the securities disclosures made by the FHLBanks given that its single focus is on the twelve FHLBanks.

The Finance Board currently administers a securities disclosure regulatory regime for the FHLBank System in connection with the consolidated obligations that are issued

as joint and several obligations of the twelve FHLBanks. Under Part 985 of the Finance Board's regulations, the Finance Board has established a periodic disclosure regime that requires FHLBank System securities disclosure to generally be consistent with the Securities and Exchange Commission's ("SEC") Regulations S-K and S-X, subject to limited exceptions necessary to reflect the unique structure of the FHLBanks. Under the Proposal, the Finance Board would continue to be responsible for regulating the securities disclosures of the FHLBank System.

The Bank believes that rather than taking the approach of bifurcating responsibility for FHLBank-related securities disclosures between the Finance Board and the SEC, the Finance Board should adopt a regulation that would require the FHLBanks to file periodic securities disclosures with the Finance Board in a manner similar to the requirements imposed on the FHLBank System under Part 985. The FHLBanks have provided the Finance Board with a detailed proposal for a Finance Board-administered securities disclosure regime.

Extending Part 985 in this fashion would effectively implement a regime that looks much like the one established by Congress when it enacted Section 12(i) of the Exchange Act in 1964.¹ In enacting Section 12(i), Congress determined that financial institutions are unique and appropriately regulated in the area of securities disclosure by their primary regulator. Section 12(i) was enacted in 1964 at a time when most banks did not have a holding company and, therefore, the securities activities of most of the publicly held banks at that time would have been regulated by their primary federal bank regulatory agency.² By moving this responsibility from the SEC to the federal bank regulatory agencies, Congress was making a judgment that a specialized regulator was the more appropriate reviewer from a disclosure standpoint particularly in light of financial institutions' roles in the country's payments systems. The legislative history of Section 12(i) suggests that Congress believed that the consolidation of disclosure and safety and soundness responsibility would provide for a more effective bank regulatory structure and avoid the conflict that could arise by having agencies with different missions regulating the securities of the prime players in the payments system.³

The U.S. federal securities laws are the gold standard of periodic disclosure. By having the SEC and the Finance Board follow the approach set forth in Section 12(i), the FHLBanks will achieve this disclosure standard without creating the potential for conflict with the safety and soundness authority of the Finance Board.

¹ Securities Acts Amendments of 1964, Pub. L. No. 88-467, § 3(e), 78 Stat. 565, 651 (1964).

² According to the SEC, the implementation of Section 12(i) was expected to result in approximately 600 banks transferring their Exchange Act registration from the SEC to the applicable federal bank regulatory agency. *Investor Protection: Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 88th Cong. 1364 (1964) (memorandum of the Securities and Exchange Commission with respect to the Statement of the Comptroller of the Currency on H.R. 6789 and S. 1642).

³ S. Rep. No. 88-379, at 31-36 (1963); H.R. Rep. 88-1418, at 9 (1963).

Under the 12(i) approach, the SEC would continue to promulgate the applicable disclosure rules and the Finance Board would be responsible for applying and enforcing them with respect to the FHLBanks. The Finance Board would consult with the SEC concerning accommodations that are necessary in order to address the unique aspects of the FHLBanks that arise from the statutory structure created by Congress and adopt them as amendments to the Finance Board's regulations, subject to public notice and comment. Subject to these accommodations, the same rules that apply to all other SEC registrants would apply to the FHLBanks.

The Finance Board would enforce the disclosure rules just as it enforces all other rules that apply to the FHLBanks. The Finance Board, as the safety and soundness regulator with examination authority over just twelve institutions, knows the FHLBanks better than any other regulator can. With the special insights gained from its examination of the FHLBanks, and with the benefit of the SEC's disclosure rules, the Finance Board would be in the best position to know what should be disclosed. The Finance Board would continuously review the disclosures issued by the twelve FHLBanks.

This approach avoids the potential conflict between the different missions of the two regulators. The SEC has one mission, and that is to protect the investor. The Finance Board, on the other hand, was created by Congress to balance its safety and soundness and disclosure authority to ensure that the FHLBanks can continuously access the capital markets, advance their housing finance mission, and otherwise continue to fulfill their Congressional created obligations. The Finance Board, through its safety and soundness regulatory authority, is responsible for protecting both the investor and the taxpayer. By allowing the SEC to create the rules and the Finance Board to enforce those rules, the potential for redundancy and conflict is removed, and potential harm to the taxpayer and the economy is avoided.

By having the SEC and the Finance Board follow the approach set forth under Section 12(i), the regulation of the FHLBanks would be consistent with how other federal agencies divide the responsibilities for regulation of disclosures issued by financial institutions that are not owned by a holding company. Congress created this allocation of regulatory responsibility, and it reaffirmed it as recently as 1999, when it passed the Gramm-Leach-Bliley Act. On the other hand, if the Finance Board were to delegate its disclosure responsibilities by requiring the FHLBanks to voluntarily register with the SEC, the Finance Board effectively would be ceding its authority over securities disclosure matters to the SEC, including its ability to develop new disclosure requirements or guidelines applicable to the FHLBanks. In other words, once the FHLBanks registered with the SEC, the Finance Board no longer will be able to make its own judgments as to what may or may not be appropriate for the FHLBanks in the area of securities disclosure.

Under the Section 12(i) approach, the risks of a transition to a regulator that is not familiar with the FHLBank System is reduced, while the role of the SEC in regard to disclosures by the individual FHLBanks is increased significantly. While the FHLBank

System currently makes combined annual and quarterly periodic disclosures generally consistent with the SEC rules, each of the twelve individual FHLBanks would begin to describe its business, management, results of operations and financial condition in the manner required by the SEC, with the same frequency as other registrants. This would result in the distribution of periodic disclosures at both the FHLBank and the FHLBank System levels, which would be made in comparable form to that required of public companies under the Exchange Act: (i) Annual Reports (Form 10-K) including financial statements audited by a public accounting firm that meets the standards of independence required for auditing Exchange Act reporting companies; (ii) Quarterly Reports (Form 10-Q); and (iii) Current Reports (Form 8-K). All FHLBank and FHLBank System periodic reports should be published on EDGAR, or a comparable FHLBank electronic disclosure network.

As we discuss in detail in Section II below, we do not believe that the Finance Board has the legal authority to issue a final rule in the form of the Proposal. Accordingly, we respectfully request that the Finance Board withdraw the Proposal in its current form.

As we discuss in Section III below, the Proposal does not provide any evidence that the Finance Board has conducted an analysis of the costs, risks, uncertainties and contingencies associated with requiring FHLBank registration with the SEC. Our review indicates that these costs, risks, uncertainties and contingencies are significant and are factors that the Finance Board must take into account in determining whether an attempt to require FHLBanks to register with the SEC is consistent with the responsibilities of the Finance Board to ensure that the FHLBanks continue to serve their statutory mission of assisting their members in providing low cost housing finance to America's homebuyers and to ensure that the FHLBanks continue to be able to raise funds in the capital markets.

For example, registration by the FHLBanks ultimately could result in delays in the debt issuance process through which the FHLBanks have accessed the capital markets. Such delays could be triggered by an SEC question or comment about a material accounting convention or disclosure of one or more of the FHLBanks. As a result, the FHLBanks may be forced to maintain higher levels of liquidity to account for the possible disruption in their traditional source of funding. The costs of maintaining higher levels of liquidity (which likely would result in reduced FHLBank net income) would ultimately be passed on to members either in the form of higher advance rates or reduced dividends on FHLBank capital stock. Members, in turn, would either absorb these additional costs or pass them on to their customers in the form of higher rates on mortgages.

This scenario ultimately could result in the FHLBanks becoming less relevant to their members which could seek alternative, less costly sources of liquidity to fund their operations. As a result, the FHLBanks could find it difficult, if not impossible, to satisfy their housing finance mission. While it is difficult to quantify this risk, we do not believe that this scenario is far-fetched. Accordingly, the Bank is concerned that its directors could face potential liability by voluntarily registering with the SEC to the extent such

registration leads to materially increased costs to the Bank, its members and American homeowners. The adoption of the Proposal would not eliminate this risk, particularly since we do not believe the Finance Board, as discussed below, has the authority to unilaterally rewrite the statutory scheme enacted by Congress.

A. Sound Corporate Governance Requires More Analysis and Better Information

This Board of Directors is mindful of its statutory and regulatory obligations to “administer the affairs of the bank fairly and impartially”⁴ and carry out our duties “in good faith, in a manner such directors believe to be in the best interests of the Bank, and with such care, including reasonable inquiry, as an ordinary prudent person in a like position would use under similar circumstances.”⁵

We take these responsibilities very seriously, particularly when we have reliable evidence, as set forth herein, that registration under the Exchange Act may have a quantifiable economic impact on the FHLBanks, their members and home-buying Americans, who indirectly rely upon the operating efficiencies of the FHLBank System. To the extent that the Finance Board has not conducted or completed comprehensive economic modeling, market research, or operational analysis that quantify the economic and operational advantages and disadvantages of registration -- and the Finance Board has published none -- we believe that a request or mandate to voluntarily register is essentially asking the Board of this Bank, among other things, to make a judgment without a reasonable inquiry and leap into the chasm of unknown fiduciary risk. We believe that sound corporate governance in the current environment requires more, particularly since the structure, nature and operation of the FHLBank System looks nothing like the public company model at which the Exchange Act is directed. Frankly stated, we believe that the Finance Board’s regulations impose upon us the responsibility to evaluate and assure that we and it have fully evaluated the merits of such a sudden shift in how the law has been applied and the FHLBank System has operated for 72 years, before any determination about voluntary registration can responsibly be reached.

To the extent that the Finance Board nevertheless determines to adopt the Proposal in its current form, we believe that it is essential that the Finance Board make any requirement for the FHLBanks to register with the SEC contingent on the satisfaction of a number of conditions intended to ensure that such registration does not adversely affect the FHLBanks’ ability to continue to operate successfully in carrying out their mission within the statutory structure established by Congress in the Federal Home Loan Bank Act (“FHLBank Act”). These conditions are described in Section V below.

⁴ 12 U.S. C. § 1427(J)

⁵ 12 U. S. C. §917.2(b)(1)

II. The Finance Board Does Not Have the Legal Authority to Adopt the Proposal in its Current Form and Should Withdraw It

The Finance Board, operating subject to the authority conferred on it by the FHLBank Act, does not have the authority to adopt a regulation that requires the FHLBanks to voluntarily register a class of their equity securities with the SEC under the Exchange Act. In fact, the very operative words of the Proposal demonstrate its fatal flaw.

The Finance Board, by characterizing registration with the SEC as “voluntary,” recognizes the essential fact that over the course of the nearly 70 years since the Exchange Act was enacted by Congress, it has been and continues to be understood that the FHLBanks are exempt from any requirement to register their equity securities with the SEC under the Exchange Act.⁶ No FHLBank has ever been required to register with the SEC under the Exchange Act. To the contrary, the Finance Board has affirmed the exemption of the FHLBanks from registration under the federal securities laws⁷ and has adopted its own regulations that govern periodic securities disclosures by the FHLBank System and the financial statements distributed by the FHLBanks to their members.⁸

The essence of the Proposal plainly reflects a decision by the Finance Board that Congress erred in enacting the Exchange Act in a manner that exempts the FHLBanks from registration with the SEC. As the courts have repeatedly held, however, an administrative agency cannot take actions beyond the scope of the regulatory structure created by Congress and the authority conferred by Congress on the agency, regardless of how well intentioned such actions may be.⁹ To the contrary, administrative agencies, such as the Finance Board, are legally bound to operate within the limitations of the authority that Congress has conferred on them.

The Finance Board in the Proposal makes no claim that Congress, in establishing the Finance Board under the FHLBank Act, expressly authorized it to require the

⁶ A 1992 joint report on the government securities market by the SEC, the Department of the Treasury and the Board of Governors of the Federal Reserve System stated that securities issued by government sponsored entities (including the FHLBanks) “historically have been exempt from registration under the federal securities laws.” Joint Report on the Government Securities Market, Appendix D (Jan. 1992).

⁷ In a 1998 proposed rule regarding financial disclosure by the FHLBanks, the Finance Board stated that, “securities issued by both the Finance Board [which at that time was the issuer of FHLBank System consolidated obligations] and the Banks are exempt from the registration and reporting requirements of both the Securities Act and the Exchange Act.” Financial Disclosure by Federal Home Loan Banks, 63 Fed. Reg. 5315, 5316 (1998).

⁸ 12 C.F.R. § 985.6, 12 C.F.R. pt. 985 Appendix A; 12 C.F.R. § 989.4.

⁹ See Section II.A. below.

FHLBanks to register with the SEC. Lacking an express statutory authorization to delegate its regulatory responsibility to another agency, the Finance Board sets forth three rationales for the Proposal:

- (1) The FHLBank System's ability to access the capital markets may be better secured if each of the twelve FHLBanks voluntarily registers with the SEC, thereby subjecting the FHLBanks to the SEC's periodic disclosure system.
- (2) FHLBank accounting and financial statement reporting issues have become significantly more complex in recent years, particularly with respect to the application of FAS No. 133, and necessitates more comprehensive and detailed disclosure by the FHLBanks. The SEC staff has the extensive accounting experience required to review this FHLBank disclosure.
- (3) Since Fannie Mae has voluntarily registered its common stock with the SEC under the Exchange Act, and Freddie Mac has agreed to do so, there may be merit in having the securities disclosures of all of the housing GSEs overseen by the same regulator.

The Finance Board's first rationale is presented as a speculative one, without any effort to provide empirical, or factual evidence or other forms of support. Changes in a system that has functioned for over 70 years pursuant to congressional mandate cannot be made without the authority to do so. Even when that authority exists, to make such changes without such evidence or support is arbitrary and capricious regulatory behavior.

The second rationale is simply inconsistent with the responsibilities that Congress has given directly and exclusively to the Finance Board. Review of the accounting and financial reporting of the FHLBanks has always been an integral part of the Finance Board's responsibility to examine and supervise the FHLBanks. While the Finance Board's modesty is notable, it is difficult to believe that the Finance Board itself is not fully capable of conducting this essential review with its own staff. In fact, until 2001, the Finance Board itself prepared the FHLBank System's periodic securities disclosures. Since that time, the Finance Board by virtue of 12 C.F.R. § 985.6(b)(5) has undertaken and presumably discharged its obligation to determine whether or not the FHLBank System periodic reports comply with the Finance Board's requirements for financial statements and disclosures under 12 C.F.R. § 985.6. If the Finance Board believes that it has the financial and regulatory expertise to review and regulate approximately three quarters of a trillion dollars of FHLBank assets and debt, as well as portfolios that include complex interest rate exchange agreements and hedging strategies and instruments, it must, by definition, possess the financial acumen to review annual and quarterly reports of the FHLBanks.

Finally, the registration of Fannie Mae and Freddie Mac, public companies listed on the NYSE, bears no relationship to the structure, operation, mission, duties and responsibilities of the FHLBanks.

By bringing the FHLBanks under the purview of the SEC, the Proposal would introduce an entirely new regime of regulation. Under well-settled principles of administrative law, a federal agency may not regulate beyond the scope of authority delegated to it by Congress. No matter how admirable an agency's goal, good intentions cannot empower an agency to regulate -- such power can only be granted by Congress. Similarly, an agency cannot regulate in a particular area simply because no statute expressly forbids its actions -- agencies may act only because, and to the extent that, Congress delegates them the power to do so. Thus, absent new legislation, we believe that the Finance Board is without authority to adopt the Proposal in its current form.

A. No Matter How Laudable the Finance Board's Goals, It Cannot Regulate or Amend a Regulatory Scheme Absent a Delegation of Authority from Congress

While the Finance Board may believe that the Proposal would positively affect the FHLBank System, such well-meaning intentions cannot provide the authority to regulate. As a creature of statute, "an agency literally has no power to act . . . unless and until Congress confers power upon it."¹⁰ Thus, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."¹¹ Because an agency's authority is strictly circumscribed by congressional delegation of power, it is well-settled that, "[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'"¹²

The Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, is illustrative.¹³ In that case, the Food and Drug Administration ("FDA") sought to combat

¹⁰ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); see also *FAG Italia S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002).

¹¹ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); see also *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

¹² *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)); see also *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002) (holding that rules promulgated by the Federal Communications Commission were not authorized by statute; although "[t]he rules may be highly salutary[,] . . . [w]hat is determinative here is the FCC acted without delegated authority from Congress").

¹³ *Brown & Williamson*, 529 U.S. 120.

“one of the most troubling public health problems” -- premature death because of tobacco use -- by asserting jurisdiction to regulate tobacco products.¹⁴ In making its assertion of jurisdiction, the FDA reversed the position that it had held for approximately eighty years. Notwithstanding the FDA’s laudable goal, however, because the statute under which the FDA purported to act did not grant it the authority to regulate tobacco, and because Congress had, “for better or for worse . . . created a distinct regulatory scheme for tobacco products” that did not include the FDA, the Court held that the FDA could not regulate tobacco products.¹⁵

In reaching this decision, the Court squarely rejected the argument that Congress would make a delegation of such importance by implication, rather than expressly, stating that “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”¹⁶ Thus, without “question[ing] the seriousness of the problem that the FDA . . . sought to address,” the Court explained:

[N]o matter how “important, conspicuous, and controversial” the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And, “[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of [a] statute beyond the point where Congress indicated it would stop.”¹⁷

Because the FDA sought to regulate tobacco products without authority delegated by Congress, the Court invalidated its actions.

¹⁴ *Id.* at 125.

¹⁵ *Id.* at 159-60.

¹⁶ *Id.* at 160. Indeed, where agencies claim to have been delegated significant regulatory powers by implication, courts view such claims with marked skepticism. *See, e.g., MCI Telecomms. Corp. v. American Tel. and Tel. Co.*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion -- and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”); *University of the District of Columbia Faculty Ass’n/NEA v. District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 163 F.3d 616, 621-22 (D.C. Cir. 1998) (“[I]t is highly unlikely that Congress intended to give the Control Board the power to repudiate existing labor contracts . . . without seeing fit to mention this power even once in the [enabling statute] or its legislative history.”) (emphasis omitted).

¹⁷ *Brown & Williamson*, 529 U.S. at 161 (citations omitted).

As the *Brown & Williamson* decision demonstrates, an agency may not promulgate regulations or amend a regulatory scheme, even if the change might in its view improve the status quo, without authority from Congress. Indeed, the Supreme Court has stated that “[agencies] are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”¹⁸

As discussed above, the Finance Board sets forth three rationales for the Proposal. While we do not believe that any of these rationales are persuasive, *even if* the Finance Board’s view of potential benefits is accurate, such aims simply cannot, alone, serve as a basis for regulation. Indeed, despite regulators’ best intentions, courts have repeatedly struck down agency actions that exceed the scope of the agencies’ delegated authority.¹⁹

Here Congress has established a statutory structure under which the FHLBanks are exempt from being required to register with the SEC under the Exchange Act, and Congress has not expressly authorized the Finance Board to take action to override that exemption. The Proposal seeks to substitute the decision of the Finance Board for that of Congress by imposing a registration requirement on the FHLBanks. As demonstrated by the foregoing decisions, agencies are simply not authorized to take such actions.

¹⁸ *MCI Telecomms. Corp.*, 512 U.S. at 231 n.4; *see also Director, Office of Workers’ Comp. Programs, Dept. of Labor v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122, 136 (1995) (“Every statute proposes . . . to achieve certain ends . . . by particular means -- and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two.”).

¹⁹ *See, e.g., MCI Telecomms. Corp.*, 512 U.S. at 234 (holding that the FCC could not revise a regulatory scheme without authority from Congress; “what we have here . . . is effectively the introduction of a whole new regime of regulation . . . which may well be a better regime but is not the one that Congress established”); *Southern California Edison Co. v. FERC*, 195 F.3d 17, 24 (D.C. Cir. 1999) (invalidating orders by FERC as inconsistent with the Federal Power Act; “an agency may not ‘avoid the Congressional intent clearly expressed in the [statutory] text simply by asserting that its preferred approach would be better policy’”) (citation omitted); *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990) (holding that the UMTA exceeded its statutory authority by imposing uniform national requirements on local authorities; “[w]here Congress prescribes the form in which an agency may exercise its authority . . . we cannot elevate the goals of an agency’s action, however, reasonable, over that prescribed form”).

B. Absent a Delegation of Power from Congress, Courts Will Not Defer to the Finance Board's Action, Nor Presume That a Delegation Exists

Without new legislation augmenting the scope of the Finance Board's powers, courts will not defer to the Finance Board's judgment or presume that the Finance Board has the power to implement the Proposal. In deciding whether a regulation promulgated by an agency represents a valid exercise of the agency's delegated powers, courts employ the two-step test provided by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*²⁰ Under the *Chevron* test, a court must first ask whether the intent of Congress on the issue at hand is clear. If congressional intent is clear, the analysis ends and the court must effectuate that intent. "This is so-called 'Chevron Step One' review."²¹ If Congress has not spoken directly to the precise issue at hand, and the agency has acted pursuant to an express or implicit delegation of authority, the agency's rule is entitled to deference so long as it is reasonable. "This is so-called 'Chevron Step Two' review."²² Congress created the Finance Board specifically to ensure the safe and sound operation of the FHLBanks. Thus, because Congress has clearly shown its intent that the FHLBanks be regulated by the Finance Board, evaluation of the Proposal is squarely controlled by the first step of the *Chevron* analysis.

While agencies, when challenged, frequently argue that their actions are entitled to deference under *Chevron* step two, the courts have emphasized that, because agencies have no inherent powers, an "agency's interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue."²³ Thus, where an agency seeks to regulate without a delegation of authority, as the Finance Board has done here, such actions receive no deference from the courts.

Similarly, it is well established that courts will not presume a delegation of power to an agency simply because there is not an express withholding of such power. In *Railway Labor Executives' Ass'n v. National Mediation Bd.*, the D.C. Circuit heard a challenge to the National Mediation Board's interpretation of the Railway Labor Act.²⁴ Under the statute, the Board was given the authority to investigate representation disputes only "upon the request of either party to the dispute."²⁵ Although nothing in the statute

²⁰ 467 U.S. 837 (1984).

²¹ *Motion Picture Ass'n of America*, 309 F.3d at 801.

²² *Id.*

²³ *Id.* (emphasis in original); see also *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1175 (D.C. Cir. 2003); *Natural Resources Def. Counsel v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) ("[i]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*") (citation omitted).

²⁴ 29 F.3d 655 (D.C. Cir. 1994) (en banc).

²⁵ *Id.* at 658.

authorized the Board to investigate or resolve a representation dispute on its own initiative or at the request of a carrier (a carrier was not a “party”), the Board announced that carriers, as well as the Board itself, could initiate representation proceedings. A coalition of railroad employees challenged the Board’s new procedures as being beyond the Board’s statutory authority.

Ruling in favor of the employees and invalidating the Board’s action, the full panel of the D.C. Circuit stated that, without a statutory delegation of authority to support its actions, “the Board’s position . . . amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area. We categorically reject that suggestion.”²⁶ Further, rejecting the Board’s argument that its actions were entitled to deference under the *Chevron* test, the court explained:

To suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (i.e., when the statute is not written in “thou shalt not” terms), is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent.... Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.²⁷

Thus, it is clear that the absence of an express proscription on agency action cannot implicitly grant an agency the power to regulate -- delegated authority from Congress is required.²⁸

Although Congress has given the Finance Board the authority “to promulgate and enforce such regulations and orders as are necessary” to carry out its mandate, this seemingly broad provision cannot be construed as an invitation to regulate at will or to indefinitely expand the mandate it has been given by law.²⁹ The D.C. Circuit dealt with a

²⁶ *Id.* at 670 (emphasis in original).

²⁷ *Id.* at 671 (emphasis in original).

²⁸ The *Railway Labor* court’s holding has become a firmly established principle of administrative law. See, e.g., *Aid Ass’n for Lutherans*, 321 F.3d at 1174-75. (“[T]he Postal Service’s position seems to be that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency. We reject this position as entirely untenable under well-established case law.”) (collecting cases); *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) (“[W]e will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.”).

²⁹ Neither 12 U.S.C. § 1422b(a)(1), the principle provision relied upon by the Finance Board for authority, nor the other provisions relied upon, 12 U.S.C. §§ 1422a(a)(3)(A), 1422a(a)(3)(B)(iii),

similar statutory provision in *University of the Dist. of Columbia Faculty Association/NEA v. District of Columbia Fin. Responsibility and Management Assistance Authority*.³⁰ In that case, in response to the District of Columbia's financial problems, Congress statutorily created a Control Board. The Control Board was granted substantial authority over the financial management of the District, including the power to issue "such orders, rules, or regulations as it considers appropriate to carry out the purposes of [its enabling statute]."³¹ In an effort to limit the District's budget, the Control Board issued an order authorizing the trustees of the University of the District of Columbia ("UDC") to reduce the University's faculty notwithstanding a collective bargaining agreement between UDC and its employees. When the trustees implemented the order by conducting a reduction in force that disregarded the employees' collective bargaining agreement, the employees filed suit contending that the Control Board's order exceeded its powers.³²

After noting that the Control Board's enabling statute did not expressly grant it the power to nullify collective bargaining agreements, the D.C. Circuit stated that the issue was whether the general scheme of the statute implied that Congress intended to grant the Control Board such power.³³ Affirming the district court's ruling that the Control Board exceeded its delegated authority, the D.C. Circuit stated that, "Appellants' premise -- that the Control Board has the authority to do anything that is not expressly prohibited by [statute] -- is quite extraordinary and we reject it."³⁴ Despite the general rulemaking power given to the Control Board, the court explained:

[A]ppellants cannot avoid the conclusion that their argument essentially boils down to a claim that because Congress never said that the Control Board could not unilaterally modify existing agreements, the power to do so is implicit in the [statutory scheme]. . . . [A]ppellants' reading of the [statute] requires precisely the kind of tortured statutory interpretation that we spurned in *Railway Labor*.³⁵

mention a single word about the SEC or the Exchange Act or give the Finance Board the authority to implement the Proposal in its current form.

30 163 F.3d 616 (D.C. Cir. 1998).

31 *Id.* at 618.

32 *See id.* at 619.

33 *See id.* at 620.

34 *Id.* at 621.

35 *Id.*

Further, the court added, “it is highly unlikely that Congress intended to give the Control Board the power to repudiate existing labor contracts . . . without seeing fit to mention this power even once in the [statute]”³⁶ Thus, the court held that the Control Board overstepped its authority.³⁷

Clearly, without a statutory delegation of authority to support its proposed regulation, the Finance Board’s action is not entitled to deference. Moreover, *Railway Labor* and its progeny make clear that neither the Finance Board’s general rulemaking authority nor the absence of an express prohibition on what it now seeks to do, can validate the Finance Board’s Proposal.

C. The Finance Board Should Request an Advisory Opinion from the Office of Legal Counsel

Where an agency faces a significant legal issue, such as whether it possesses the authority to issue a particular regulation, it may seek a legal opinion from the Department of Justice’s Office of Legal Counsel (“OLC”).³⁸

In circumstances strikingly similar to those presented here, other financial institution regulatory agencies have sought guidance from OLC. In *Authority of the Fed. Fin. Supervisory Agencies Under the Community Reinvestment Act*, the Comptroller of the Currency sought an opinion from OLC regarding whether a proposed rule overstepped agency authority.³⁹ In that situation, the federal financial supervisory agencies (“the agencies”) proposed a rule, purportedly under the Community Reinvestment Act of 1977 (“CRA”), providing that a financial institution determined to be in “substantial noncompliance” with its obligations under the CRA would be subject to certain enforcement actions.⁴⁰

Relying on *Railway Labor*, OLC stated “we do not believe it is permissible for the agencies to employ [certain] enforcement mechanisms, [purportedly] on the authority of

³⁶ *Id.* at 621-22 (emphasis omitted).

³⁷ See also *Motion Picture Ass’n of America*, 309 F.3d at 806 (vacating FCC’s order despite statutory delegation of authority “to regulate in the public interest ‘as may be necessary to carry out provisions of [the] [statute] The FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue. . . . Were an agency afforded carte blanche under such a broad provision . . . it would be able to expand greatly its regulatory reach.”) (citations omitted).

³⁸ Requesting such an opinion is authorized by 28 C.F.R. § 0.25 (providing that the Assistant Attorney General, Office of Legal Counsel shall render “informal opinions and legal advice to the various agencies of the Government”).

³⁹ 18 Op. Att’y Gen. 249, 1994 WL 810698 (1994)

⁴⁰ *Id.* at *250.

the CRA, in the absence of some basis in the text of the statute. Agencies may act only pursuant to delegations of power that are explicit or can fairly be implied from the statutory scheme.”⁴¹ Finding no such delegation in the CRA’s scheme, OLC concluded that the agencies lacked the enforcement authority asserted in the proposed rule.⁴²

Here, where, as described above, there is strong reason to believe that the Finance Board lacks the authority to adopt the Proposal in its current form, and where the Proposal would have a significant impact on the FHLBanks that would be subject to its requirements, it seems particularly appropriate for the Finance Board to request such an opinion from the OLC.

III. Adoption of the Proposal Would be an Arbitrary and Capricious Action by the Finance Board Since the Proposal Does Not Provide Any Indication that the Finance Board has Conducted a Meaningful Analysis of the Business, Operational, Financial or Legal Costs, Benefits, Disadvantages, Uncertainties and Contingencies Associated with Requiring FHLBank Registration with the SEC

As discussed above, the Finance Board in the Proposal does not provide any indication that it has conducted any empirical or other analysis of the potential impact of the Proposal on the FHLBanks. None of the three rationales given for the Proposal cite any research or analysis done by the Finance Board to support these rationales. We believe that it was incumbent on the Finance Board to consider the potential impact of a requirement for the FHLBanks to register with the SEC as part of its development of the Proposal.

We further believe that the Proposal, if adopted in its current form without an appropriate development, analysis and consideration of its impact on the FHLBanks, including the impacts discussed below, would be subject to being invalidated by a court on the grounds that the Finance Board’s actions were arbitrary and capricious, as we discuss in Section III.B. below.

A. First Manhattan Consulting Group Analysis of Potential Costs Related to SEC Registration

The FHLBanks retained First Manhattan Consulting Group (“First Manhattan”), a well-respected financial consulting firm, to analyze the potential benefits or costs related to registration of the FHLBanks with the SEC. First Manhattan’s analysis indicates that there may be substantial costs associated with such a registration requirement.

⁴¹ *Id.* at *250-51.

⁴² OLC also rejected, under *Railway Labor*, the argument that the agencies’ proposed rule was authorized simply because it was not expressly forbidden by the CRA. *See id.* at *250-51.

First Manhattan has identified several areas in which SEC registration could have a financial impact on the FHLBanks, the most critical of which is the FHLBank and System's liquidity needs and costs. A summary of First Manhattan's conclusions in this regard is set forth below.

1. Liquidity-related Potential Costs

a. FHLBank System Liquidity

Moving the twelve FHLBanks from Finance Board oversight to SEC oversight and requiring each to file quarterly and annual reports creates, when combined with the periodic reports already issued by the Office of Finance, 52 reports that could lead to questions or comments. The increased possibility of delay in debt issuances⁴³ and/or a widening in the FHLBank System's debt spreads under an SEC registration regime creates potential costs, to the extent that it creates a need to hold a higher level of liquidity in the FHLBank System. The precise cost of this additional liquidity depends on the increased risk that each Board of Directors sees for a potential funding disruption, the source of the additional liquidity and reasonable estimates of liquidity needs under a new regime. At the extremes, the per annum costs range from \$109 million to \$727 million for 60 days of additional liquidity. A reasonable estimate of new costs to the System ranges between \$300 and \$500 million per annum. Those costs will be passed on to the members,⁴⁴ which in turn, will pass them on to American homebuyers in the form of higher mortgage rates.

⁴³ The possibility of a delay in FHLBank System debt issuances following registration by the twelve FHLBanks with the SEC may increase, if for no reason other than the reviewers will not be familiar with the cooperative structure and nature of the FHLBank System and the joint and several liability that the FHLBanks share with respect to their consolidated obligations. Given the demands on SEC staff, with thousands of registrants to deal with, as compared to the Finance Board, with regulatory responsibility for only twelve FHLBanks, there can be no assurance that such issues, even if they prove not to be problematic, will be resolved as promptly with the SEC, or with the same degree of recognition of the unique statutory structure of the FHLBank System, as they have been under the Finance Board's exercise of its securities disclosure jurisdiction over FHLBank System disclosures. The Board of Directors of each FHLBank will, in the exercise of prudence, naturally evaluate whether this change requires an increase in the liquidity currently held to deal with delays or disruptions in the issuance process.

⁴⁴ There are numerous ways in which these costs may be passed on to the members. Increased liquidity means a restructuring of the balance sheets of each FHLBank in one of several ways. A FHLBank could grow in size and add liquid assets. This could result in a FHLBank being subject to higher capital stock investment requirements. Alternatively, a FHLBank could sell longer term, higher yielding assets and replace them with lower yielding short-term assets. That could reduce the FHLBank's interest rate margin and potentially its net income. Reductions in income would likely lead to reduced dividends on FHLBank stock and/or higher advances rates being charged to members. In any event, the member net cost of funds related to FHLBank membership increases, meaning that they increase the rates they charge their customers.

b. Member Liquidity

If the FHLBank System became more exposed to funding delays or disruptions, prudent member institutions would eventually change their liquidity management strategy to lower their reliance on FHLBank System liquidity. Should members respond to a perceived need to diversify their sources of liquidity, by for example, substituting 20 percent of their current, unused borrowing capacity at the FHLBanks with low yielding Treasuries (which would be used to access the Fed discount window), member institutions could also see their own liquidity management costs increase by \$500 million per annum.

B. Legal Implications of the First Manhattan Analysis

The costs that may be associated with SEC registration may be significant both in the short-term and over the long-term. As a practical matter, these costs are likely to be passed through to homeowners, since the FHLBanks are unlikely to be able to absorb the costs of SEC registration.

The Finance Board should have analyzed and evaluated these possible impacts and addressed them directly in the Supplementary Information section of the Proposal. We further believe that the Finance Board must consider this information and its implications for the FHLBanks, member institutions and homebuyers in determining whether to adopt the Proposal in its current form as a final regulation.

Even if a court were to find that the Proposal is within the Finance Board's authority, if the Proposal is implemented as a final rule without consideration and analysis of its possible financial consequences, its action would likely be set aside as arbitrary and capricious.

It is well settled that, in order to avoid having its regulation set aside as arbitrary and capricious, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."⁴⁵ Additionally, when an agency determines to change an existing regulatory regime, it must do so on the basis of "reasoned analysis."⁴⁶ Thus, "[n]ormally, an agency rule *would be* arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem"⁴⁷

⁴⁵ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

⁴⁶ *AT&T Corp. v. FCC*, 236 F.3d 729, 735 (D.C. Cir. 2001) (citation omitted).

⁴⁷ *State Farm*, 463 U.S. at 43 (emphasis added).

Here, the record offers no evidence that the Finance Board has examined any relevant data, and the Finance Board's articulated explanation for its actions, such as one exists, is conclusory at best. No facts have formally been found to support the rationale behind the Proposal. Instead, the Finance Board seeks to dramatically alter an entire regulatory regime without any meaningful analysis.

Moreover, the Finance Board has wholly failed to consider, at least formally, the potentially negative financial impact of the Proposal -- certainly, an "important aspect" of the proposed rule. If the Finance Board proceeds to finalize the Proposal on this sparse record, its actions will be subject to being set aside as arbitrary and capricious.⁴⁸ The increased financial costs and uncertainties associated with SEC registration provide strong additional support for our recommendation that the Finance Board withdraw the Proposal and adopt and administer its own securities disclosure regime for the individual FHLBanks.

IV. The Finance Board Has Not Complied with the Paperwork Reduction Act

In promulgating the Proposal, the Finance Board has not complied with the Paperwork Reduction Act ("PRA").⁴⁹ Under the PRA, "[a]n agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information . . . the Director [of the OMB] has approved the proposed collection of information."⁵⁰ Yet, while the Proposal obviously comes within the ambit of the PRA, the Finance Board has -- quite openly -- failed to seek approval from OMB for its proposed actions.⁵¹ Thus, if the Finance Board continues to ignore its statutory obligations under the PRA, *even if* the Proposal is adopted as a final rule, it will be unenforceable.⁵²

⁴⁸ See *id.* at 48 ("There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such . . . practice . . .") (citation omitted); see also *AT&T*, 236 F.3d at 737 ("No matter how reasonable the FCC's position . . . the FCC's 'conclusory statements cannot substitute for the reasoned explanation that is wanting in this decision.'") (citation omitted); *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1407 (D.C. Cir. 1995) (holding that an agency's "conclusory statements . . . do not meet the requirement that 'the agency adequately explain its result'" (citation omitted); *Puerto Rico Higher Educ. Assistance Corp. v. Riley*, 10 F.3d 847, 853 (D.C. Cir. 1993) ("One of the fundamental principles of administrative law is that an agency's actions must be supported by reasoned decisionmaking. . . . We simply insist that the Department fulfill its legal obligations to justify and explain the basis for its actions.").

⁴⁹ See 44 U.S.C. § 3501-3521.

⁵⁰ 44 U.S.C. § 3507(a).

⁵¹ See 68 Fed. Reg. 54,396, 54,399 (Sept. 17, 2003) ("[T]he Finance Board has not submitted any information to the Office of Management and Budget for review.").

⁵² See *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 244 F.3d 144, 145-46 (D.C. Cir. 2001).

By its plain terms, the Proposal clearly entails a “collection of information” within the meaning of the PRA.⁵³ The Proposal expressly requires each of the twelve FHLBanks to submit, *inter alia*, “annual report[s], quarterly reports, [and] current reports” to both the SEC and the Finance Board.⁵⁴ Nevertheless, the Finance Board asserts that the Proposal “does not contain any collections of information pursuant to the [PRA].”⁵⁵

A similar situation was addressed by the D.C. Circuit in *Center for Auto Safety v. National Highway Traffic Safety Administration*.⁵⁶ In that case, the National Highway Traffic Safety Administration (“NHTSA”) issued a mandatory information request to nine airbag manufacturers and importers seeking information on systems used in certain years.⁵⁷ The district court found that, because the NHTSA did not comply with the PRA, the agency had no authority to enforce its requests.⁵⁸ On appeal, the D.C. Circuit affirmed:

Under the Paperwork Reduction Act, if NHTSA seeks to collect information from 10 or more persons or entities, NHTSA must obtain prior approval from OMB. 44 U.S.C. § 3502(3)(A)(i) (Supp. IV 1998). If NHTSA fails to obtain prior approval from OMB, the request for information can be ignored without penalty. 44 U.S.C. § 3512(a)(Supp. IV 1988). . . . Although NHTSA expected that the Information Request would be submitted to 10 or more entities, NHTSA

⁵³ 44 U.S.C. § 3502(3) provides that the term “collection of information” --

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either --
(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes

⁵⁴ 68 Fed. Reg. at 54,399-400 (proposed sections 998.2(b) and (d)).

⁵⁵ *Id.* at 54399.

⁵⁶ *Center for Auto Safety*, 244 F.3d 144.

⁵⁷ *See id.* at 145.

⁵⁸ *Id.*

did not get prior approval from OMB. As a result, NHTSA had no authority to enforce the information request.⁵⁹

Just like the NHTSA in *Center for Auto Safety*, here the Finance Board clearly seeks to collect information, through the Proposal, from at least ten entities -- namely, the twelve FHLBanks. Thus, it is self-evident that the Finance Board must comply with the PRA. As the case law makes clear, if the Finance Board fails to do so, the Proposal will be unenforceable.

V. **If the Proposal is Nevertheless Implemented, Registration with the SEC Should Be Conditioned on the Satisfaction of Certain Conditions Necessary to Accommodate the Unique Structure and Operations of the FHLBank System**

As described in Section II above, the Finance Board does not have the legal authority to implement the Proposal in its current form. To the extent the Finance Board determines to do so, however, it would subject the FHLBanks to the regulatory jurisdiction of another agency that does not share the Finance Board's statutory responsibilities for maintaining the safety and soundness of the FHLBanks and for ensuring that the FHLBanks are able to raise funds in the capital markets. Accordingly, it seems imperative that the Finance Board take prudent steps to minimize the possible adverse impact of such SEC registration on the FHLBanks and on the Finance Board's ability to continue to carry out the mission assigned to it by Congress.

The first condition that we believe should be specified in any final regulation would be the execution of a memorandum of understanding between the Finance Board and the SEC ("MOU"). The MOU should be approved by the Directors of the Finance Board and the Commissioners of the SEC.

The MOU should provide that the Finance Board's imposition of a regulatory requirement for the FHLBanks to voluntarily register a class of equity securities with the SEC is contingent upon the SEC's continued adherence to principles relating to its exercise of jurisdiction over the FHLBanks as Exchange Act registrants as set forth in the MOU ("Registration Principles"). It should also provide that if the Finance Board determined at any time that the SEC was not complying with any of the Registration Principles, the Finance Board would so notify the SEC. If the SEC was unable to satisfy the Finance Board within a 30-day period that it was in compliance with the Registration Principles, the SEC would agree that any FHLBank that had registered with the SEC under the Exchange Act would be permitted to deregister upon 30 days notice to the SEC, without regard to whether the FHLBank had less than 300 shareholders of record as specified in Exchange Act Rule 12g-4.

⁵⁹ *Id.* at 148-49; *see also Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 32 (D.C. Cir. 1998) ("[T]he [FCC] must itself have complied with the PRA before it may enforce that information collection requirement under § 308 of the Communications Act.").

The MOU should make the twelve FHLBanks express third party beneficiaries of this provision and authorize an FHLBank to bring an action against the SEC to assert its deregistration rights under the MOU. The final regulation would provide that an FHLBank that had exercised its deregistration rights under the MOU would not be subject to any continued SEC registration obligation under the regulation.

We believe that the Registration Principles should include at a minimum, the following core points.

1. Statements of condition of the individual FHLBanks and combined statements of condition of the FHLBanks should not be required to reflect any liability amount for the future obligations by the FHLBanks to the Resolution Funding Corporation.
2. Statements of condition of the individual FHLBanks should not be required to reflect the fair value of any liability related to the contingent payment liability of an FHLBank for repayment of consolidated obligations of the FHLBank System of which it did not receive proceeds.
3. Statements of condition of an individual FHLBank should not in any respect be required to reflect or take into account the financial condition of any other FHLBank, nor should an individual FHLBank be required to make any statement or certification in relation to the financial statements, operations or activities of any other FHLBank.
4. Individual FHLBank and combined statements of condition of the FHLBank System should reflect as equity all shares of Class A and Class B Stock. Such stock should not be required to be referred to as putable, and the submission of a redemption notice by a member or the occurrence of any other redemption triggering event should not change the continued equity treatment of the stock.
5. The FHLBanks should be authorized to continue to prepare their joint financial statements issued in connection with consolidated obligations in the form of combined financial statements.
6. The FHLBanks should be exempted from the application of provisions of the Exchange Act and SEC rules that are not appropriate or consistent with the unique Congressionally mandated structure of the FHLBanks. Specifically such exemptions should apply to sections 13(d), (e), (f) and (g), sections 14(a), (c), (d) and (f) and section 16 of the Exchange Act and the SEC rules issued thereunder, as well as to the SEC's Regulation FD.
7. The SEC should document changes in accounting or disclosure presentation that it will impose on the FHLBanks in writing by the

Director of the appropriate SEC division with the concurrence of the Commissioners.

8. The SEC will give prompt consideration to requests by the Finance Board or an FHLBank for exemptive action or interpretive advice in regard to provisions of the Exchange Act and SEC rules that may interfere with or may not be properly applicable to an FHLBank because of the cooperative membership structure of the FHLBanks, the absence of a public market for the equity securities of the FHLBanks, the frequent issuance of joint and several liability consolidated obligations by the FHLBanks through the Office of Finance or other circumstances relating to the unique structure of the FHLBank System.
9. The SEC will act promptly and on a priority basis in resolving any issues that may arise in regard to an FHLBank that is registered with it in order to minimize the potential for disruption of the Office of Finance's issuance of consolidated obligations. The SEC in resolving any such issues must give due consideration to the safety and soundness of the individual FHLBank and the FHLBank System and to the importance of maintaining the access of the FHLBanks to the capital markets.
10. As government sponsored enterprises dedicated to carrying out a public mission established by Congress, the FHLBanks should not be required to pay any registration or other fees that may, in the future, be imposed by the SEC on registrants under the Exchange Act, unless required to do so by an act of Congress. Since the FHLBanks do not have publicly traded stock that trades in a market, the FHLBanks also should not be required to pay an accounting support fee to the Public Company Accounting Oversight Board or to any standard setting body designated by the SEC to establish accounting principles.

The second condition that we believe should be specified in any final regulation is the issuance by the Finance Board of a final regulation providing that an FHLBank shall have complete discretion as to whether to redeem shares of Class A or Class B Stock of a continuing member as to which the applicable redemption period has expired. This revision would avoid possible adverse accounting and financial statement characterizations under Generally Accepted Accounting Principles of Class A and Class B Stock.

VI. Registration Should Not Occur Until the FHLBanks have Adequate Time to Evaluate How Their Unique Structure, Operation, Joint and Several Liability and Housing Mission Can Best Be Accommodated by the Exchange Act

If the Finance Board ultimately does not enter into an MOU with the SEC as described in Section V above, and nevertheless decides to adopt the Proposal in its current form, it will be essential that the FHLBanks be given adequate time to address and resolve the issues that would have been covered by the MOU in some other manner.

Depending on the status of the issues that would have been addressed by the MOU at the time the Proposal was adopted in final form, the FHLBanks might have to request various forms of exemptive or other relief from the SEC. The FHLBanks might have to request certain regulatory or other actions by the Finance Board in order to be in a position to accommodate requirements of the SEC that are not consistent with the current operations of the FHLBank System. In addition, the FHLBanks individually and collectively may be required to develop and implement new procedures and controls to address SEC requirements, particularly to the extent that the SEC may seek to impose some degree of responsibility on an individual FHLBank with respect to the financial statements, condition, or business operations of the other FHLBanks. Any such requirement would represent a major change in the current governance and information sharing principles under which the FHLBanks currently operate. It would require careful consideration by the FHLBanks and the Finance Board of how a far more integrated relationship among the FHLBanks could and should be structured, as well as the statutory and regulatory changes that might be necessary to accomplish such a restructuring.

In order to ensure that all the actions necessary for the continued safe and sound operation of the FHLBank System in the event of mandatory SEC registration are accomplished, any final version of the Proposal should include an adequate lead time before the individual FHLBanks will be required to register a class of equity securities with the SEC under the Exchange Act. In no case should registration be required that would cause the filing of periodic financial reports by the Banks prior to the annual report for 2005.

* * * * *

The Bank commends the Finance Board for its commitment to the objective of having each of the FHLBanks provide comprehensive, fully transparent securities disclosure.

Thank you again for the opportunity to comment on the Proposal.

Sincerely yours,

A handwritten signature in black ink that reads "William R. White". The signature is written in a cursive style with a large, stylized 'W' and 'H'.

William R. White
Chairman of the Board